

THE AGENDA FOR PROFESSOR IMWINKELRIED'S PRESENTATION ON UNCHARGED MISCONDUCT EVIDENCE

PART I

-----An Overview of the Fundamentals of the Analysis of Uncharged Misconduct Evidence Problems

In the final analysis, the governing law is simpler and more straightforward than it is frequently supposed to be.

-----The Specific Doctrines Governing the Admissibility of Uncharged Misconduct Evidence

#1 The doctrine codified in Federal Rule of Evidence 404(b) applies in civil actions as well as criminal prosecutions.

At common law, many jurisdictions used different sets of rules for civil and criminal cases.

#2-3 Rule 104(b) governs the preliminary fact of the person's performance of or involvement in the act; therefore, it is sufficient if the proponent presents enough evidence to support a permissive inference that the person performed the act or was involved in the event.

At common law, many jurisdictions not only assigned the decision to the judge rather than the jury; numerous jurisdictions also imposed the enhanced standard of proof of clear and convincing evidence.

Since Rule 104(b) governs the preliminary fact of the person's performance of or involvement in the event, the proponent's foundational testimony must satisfy all the technical exclusionary rules of evidence; the proponent cannot rely on the dispensation in the last sentence of Rule 104(b).

Since the jury must make the final decision, the "jury-protecting" exclusionary rules such as hearsay are applicable.

#4 404(b) applies only if the testimony describes a crime, wrong, or act "other" than or extrinsic to the conduct mentioned in the pleadings; Rule 404(b) is inapplicable when the testimony describes an act or event that is intrinsic to the conduct mentioned in the pleadings.

However, this doctrine must be differentiated from the *res gestae* and inextricably intertwined concepts.

#5 To satisfy Rule 404(b), the act need not be a "prior" act; the act need not antedate the conduct described in the pleadings UNLESS the proponent's specific theory of logical relevance necessitates proof of such timing.

Although it is common to refer to these acts as "priors," the use of that term is overbroad and potentially misleading.

#6 To satisfy Rule 404(b), the act need not be "similar" to the conduct described in the pleadings UNLESS the proponent's specific theory of logical relevance requires proof of similarity.

Although it is common to refer to these acts as "similar," the use of that term is overbroad and potentially misleading.

#7-8 To satisfy Rule 404(b), the act need not be either criminal or illegal.

Although it is common to refer to this testimony as evidence of “other crimes” or “extraneous offenses,” those expressions are overbroad and misleading.

However, under the rape sword legislation, Rules 413-15, the evidence must relate to one of the types of crimes or civil wrongs specified in the Rules. These Rules carve out true exceptions to the general character evidence prohibition.

-----*Questions from the Audience About Doctrines #1-8*

PART II

-----*The Specific Doctrines (continued)*

#9 If the act does not fall within an exception to the character evidence prohibition, the testimony is admissible only if it satisfies Rule 404(b); it is inadmissible if the proponent’s only tenable theory of logical relevance is the theory forbidden by Rule 404(b)(1). However, Rule 404(b) should not be conceived as a general rule excluding testimony about other acts, subject only to a finite number of previously recognized “exceptions.”

At common law, many jurisdictions subscribed to the so-called exclusionary conception of the doctrine: There is a general rule barring evidence of other acts, and to justify introducing the evidence the proponent must pigeonhole the evidence within a limited number of recognized exceptions to the general rule. Rule 404(b)(2) embodies an inclusionary conception of the doctrine.

#10 Rule 404(b) evidence may be used to prove the occurrence of the actus reus of the charged crime.

At common law, some courts erroneously reasoned that since the character prohibition forbids using a person’s character as circumstantial proof of his or her consistent conduct, the prohibition must forbid the use of such evidence to prove the occurrence of the actus reus, the fundamental type of conduct involved in a prosecution.

#11 The doctrine of objective chances is a legitimate, non-character theory of relevance that satisfies Rule 404(b). However, to invoke the doctrine, the proponent must not only show that the act is similar to the type of event alleged in the pleadings. In addition, the proponent must demonstrate an extraordinary coincidence; considering both the Rule 404(b) act and the act alleged in the pleadings, the person must have been involved in such events more frequently than the average, innocent person would be – the baseline frequency.

A baseline frequency is obvious for “once in a lifetime” events such as the death of one’s spouse by drowning in a bathtub.

#12 Some plan theories of relevance possess genuine non-character relevance and satisfy Rule 404(b): sequential plans, chain plans, and template plans. However, “spurious” plans—a showing of nothing more than other recent, similar acts—amount to inadmissible character evidence.

#13 Testimony about an act does not satisfy Rule 404(b) merely because the act occurred at the same time as the act alleged in the pleadings or was part of the same series of events. However, even if the testimony otherwise lacks non-character relevance, the judge may admit the testimony if it is practically inseparable from the testimony about the act alleged in the pleadings. However, if that is the only reason for admitting the testimony, the judge should tell the jury that and instruct the jury to otherwise disregard the testimony.

#14 If the testimony about the act satisfies Rule 404(b), on request the judge should give a limiting instruction under Rule 105. That instruction should not only forbid the jury from treating the testimony as evidence of the person's bad character. The instruction should also specifically identify the theory or theories on which the testimony possesses genuine non-character relevance; the judge should not give a "shotgun" instruction.

#15 If the testimony passes muster under Rule 104(b), 404(b), and 413-15, the judge may exclude the testimony under Rule 403 only if the opponent persuades the judge that the attendant probative dangers such as unfair prejudice substantially outweigh the probative value of the testimony.

#16 Under Rule 403, the judge may have options other than altogether excluding the testimony or admitting all the testimony. For example, using Rule 403 as a scalpel, the judge might admit testimony that a police officer saw the person on a previous occasion in order to increase the reliability of the officer's identification of the person but bar the specific, prejudicial detail that on that occasion the officer arrested the person for a crime.

-----*The Sequence of Analysis for Uncharged Misconduct Evidence Problems*

-----*Questions from the Audience About Doctrines #9-16*